IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.945 OF 1998

Laxman N. Deshmukh ..Petitioner.

Vs.

Madhukar B. Deshmukh ..Respondent.

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Mr.R.A.Thorat for the Petitioner.

Mr.A.V.Anturkar for the Respondent.

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CORAM : DR.D.Y.CHANDRACHUD, J.

14th December, 2005.

ORAL JUDGMENT :

1. The Petitioner instituted Regular Civil Suit 394 of 1983 for possession. CTS No.269 at Bhavani Peth, Satara belongs to the Satara Municipality. The Municipality let out the open space to several persons for carrying on business. The suit property, bearing CTS No.269/6, admeasures 9 ft. by 9 ft. and was let out by the Municipality prior to 1960 to Dadu Shripati Pawar

who constructed a shed thereon. The Petitioner purchased the shed on 15th September, 1966 and since then conducted a cycle repair shop. The Petitioner initially paid rent in the amount of Rs.8.90 to the Municipality which was increased to Rs.12/- and thereafter, from 1975, to Rs.15/-. The Respondent is related to the Petitioner and it was the contention of the Petitioner that the Respondent was engaged to work in the cycle repair shop. On receipt of a notice from the Municipality for the payment of the rent and taxes, the Petitioner claimed to have paid an amount of Rs.200/- on 15th March, 1975. The Respondent is alleged to have illegally entered his name in the Municipal records and the Petitioner thereupon filed a complaint on 29th March, 1977. By a resolution dated 25th June, 1977 the Standing Committee was of the view that the Petitioner was the tenant of the suit property. By a resolution dated 21st November, 1980 the Petitioner was directed by the Municipality to approach the Civil Court to establish his right, title and interest. A suit came to be instituted before the Civil Judge, Junior Division, Satara for possession.

2. The Respondent contested the suit and it was his case that he had purchased the shed from the Petitioner upon which he was paying rent of Rs.25/- per month to the Municipality. Hence, the Respondent contended that he was lawfully carrying on business in the premises.

3. The suit instituted by the Petitioner was dismissed by the Trial Court. The appeal by the Petitioner (Regular Civil Appeal 600 of 1986) was allowed by the Additional District Judge, Satara on 19th March, 1990. The Respondent was directed to hand over possession of the suit shed to the Petitioner within three months of the date of the order. Among the issues, the second issue framed by the Additional District Judge was whether the Petitioner was a tenant of the open space bearing CTS 269/6 and whether he had constructed a shed thereon. This issue was answered in the affirmative. The Additional District Judge noted that it was not disputed that the shed originally belonged to the Petitioner. The Respondent, it was held, failed to establish that he had purchased the shed. There was no evidence either of the purchase or payment of consideration of Rs.1,000/- to the

Petitioner as alleged. On the other hand, the Municipality had passed a resolution that the Petitioner was a tenant and that the shed belonged to the Petitioner. The suit was accordingly decreed.

4. The Second Appeal filed before this Court by the Respondent against the judgment of the Additional District Judge, Satara was dismissed on 18th June, 1990. Before this Court counsel for the Respondent conceded the claim of the Petitioner to the shed but, it was sought to be submitted that the Petitioner will have to carry away the shed. The Learned Single Judge of this Court noted that the advocate for the Petitioner herein had also conceded that the suit was for the possession of the shed and that the plot was not the subject matter of the suit. While dismissing the Second Appeal, the Learned Single Judge held thus :

> "Ultimately, it will be a question of interpretation of the decree which can be done in execution. No substantial question of law arises in this appeal, hence dismissed."

5. In pursuance of the order dated 18th June, 1990 the Petitioner filed an execution application in Regular Darkhast 132 of 1990 before the Executing Court for possession of the shed. The Respondent filed a reply and claimed that the Petitioner was entitled to take away the shed, but was not entitled to the plot underneath the shed. On 5th September, 1990, the Executing Court allowed the application at Exh.1 in Regular Darkhast and directed the Respondent as judgment debtor to deliver possession of the plot admeasuring 9 ft. by 9 ft. together with the shed standing thereon, in City Survey No.269/6. This order was challenged in a Civil Revision Application (CRA No.677 of 1990) before this Court by the judgment debtor. The Civil Revision Application was heard and disposed of by an order dated 9th July, 1997. This Court held that the decree would have to be executed as it is by delivering possession of the shed to the decree holder without anything more. However, the contention of counsel appearing for the Respondent that the Petitioner herein may take away the shed on the plot was not accepted since the decree had directed delivery of the possession

of the shed to the Petitioner, the Original Plaintiff. The order of the Executing Court was thus corrected only to the aforesaid extent viz. that the decree would have to be executed by delivery of the possession of the shed.

6. The Petitioner thereupon took out an application at Ex.26 in Regular Darkhast for necessary orders. On 15th April, 1998 the Civil Judge, Junior Division, Satara held that the decree would have to be executed as it is in view of the revisional order passed by this Court on 9th July, 1997. Consequently, a possession warrant was directed to be issued for the possession of the shed situated at CTS No.269/6. The Petitioner took out an application, Exh.32, for breaking open the lock of the shed for the reason that when the Bailiff went to execute the warrant of possession in pursuance of the order dated 15th April, 1998 the Respondent was found to have locked the shed. The Respondent once again in his reply reiterated that the Petitioner was entitled to execute the decree only by removing the shed at his own costs. The Executing Court which had passed the earlier order dated 15th April, 1998 directing the issuance

of a possession warrant for the shed, however, now directed on 18th April, 1998 that the decree holder was only entitled to get the material of the shed. Hence, the judgment debtor was directed to hand over the material of the shed to the decree holder in presence of the Bailiff of the Court.

7. The aforesaid order of the Executing Court is challenged in the Civil Revision Application.

8. On behalf of the Petitioner, it has been submitted that the Executing Court issued a possession warrant on 15th April, 1998 in respect of the shed and this order was consistent with the decree in the suit. However, within a period of three days thereafter the contention of the Respondent was accepted and an order was erroneously passed allowing the Petitioner to take away the material of the shed. Learned counsel submitted that the decree was for the delivery of possession of the suit shed and it was not open to the Executing Court to go behind the decree. The specific plea of the Respondent that the Petitioner was only entitled to the material of the shed by removing the shed was negatived in the order of

this Court dated 9th July, 1997. The decree for possession of the shed had attained finality and it was submitted that the Petitioner was entitled to the shed as it is. Significantly the Respondent has been held not to possess any right, title and interest in the land as well. The land belongs to the Municipality and the Additional District Judge, who decreed the suit held that the Petitioner is a tenant in respect of the land. Hence, it was submitted that the order of the Executing Court is patently without jurisdiction.

9. On behalf of the Respondent a preliminary objection has been raised to the maintainability of the Civil Revision Application under Section 115 of the Code of Civil Procedure, 1908. After the amendment of the Code of Civil Procedure which came into operation from 1st July, 2002, under the proviso to Section 115(1), the High Court shall not vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. In view of the judgment of the

Supreme Court in Shiv Shakti Co-op. Housing Society, Nagpur v. Swaraj Developers - (2003) 6 SCC 659, the amendment must govern this proceeding which was pending on the date of the amendment. The Supreme Court has held that the amendment relates to procedure and since by a statutory amendment the mode of procedure has been altered, the parties must proceed according to the altered mode without exception.

10. The proviso to the amended provisions of Section 115 will, however, not displace the maintainability of the present proceedings. By its order dated 15th April, 1998 the Executing Court directed the issuance of a possession warrant. Upon the issuance of a possession warrant, all that remained for the Bailiff was to proceed to execute that warrant by taking possession of the shed and handing it over to the Petitioner. No further stage in the proceedings remained in so far as the Executing Court was concerned, because once the possession warrant was duly executed, the proceedings finally stand concluded. The impugned order of the Executing Court, however, which was passed three days after the earlier order directing

the issuance of a possession warrant, directs the judgment debtor to hand over the material of the shed to the Petitioner. If the order which is impugned in this Revision is reversed as is sought by the Petitioner that would necessarily result in the reinstatement of the earlier order of the Executing Court issuing a possession warrant in respect of the shed and that would necessarily result in the disposal of the proceedings. Hence, there can be no dispute in regard to the position that the Revision is indeed maintainable.

11. In so far as the merits of the Revision are concerned, it is evident from the decree that was passed in the suit that the judgment debtor was directed to hand over possession of the suit shed to the decree holder, the Petitioner before the Court. In the Second Appeal that was decided on 18th June, 1990, it was sought to be asserted on behalf of the Respondent that the Petitioner would have to carry away the shed. This Court, it must be noted, dismissed the Second Appeal and therefore confirmed the judgment and order of the Additional District Judge by which the suit was decreed. The Learned Single Judge of this Court held in the

Second Appeal that the interpretation of the decree was a question which could be determined in execution. Again in the course of the execution proceedings when the Civil Revision Application came up before this Court on 9th July, 1997, the Respondent sought to assert that the Petitioner may take away the shed. That submission of the Respondent was specifically negatived by this Court since the decree was for possession of the shed. The Executing Court correctly issued a possession warrant in respect of the shed on 15th April, 1998. However, when the Bailiff went to take possession, the shed was found to be locked and it was at that stage the Petitioner moved an application (Exh.32) for the removal of the lock. The judgment debtor then sought to take the specious stand that the decree holder should be directed to take away the material of the shed. The position that was adopted by the judgment debtor was wholly untenable having regard to the plain directions that emanated in the final judgment and order of the Additional District Judge dated 19th March, 1990 which was confirmed in the Second Appeal by this Court. The direction of the Executing Court to the Petitioner to take away the material of the shed is contrary

to the decree, to the order passed in the Second Appeal and overlooks the circumstance that a similar submission of the Respondent was rejected on 9th July, 1997 by this Court in revision. The Respondent has been held not to have any right, title or interest in respect of the shed or the land. The land belongs to the Satara Municipality and the case of the Respondent that he had purchased the shed was negatived. In these circumstances, the impugned order of the Executing Court is unsustainable and will have to be quashed and set aside.

12. The order of the Executing Court dated 18th April, 1998 at Exhibits 32, 33 and 34 in Regular Darkhast 132 of 1990 is accordingly quashed and set aside. The Civil Revision Application is made absolute in terms of prayer clause (b). The Petitioner would be entitled to the costs of these proceedings.